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Supreme Court, U.S.
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No. 00-1447

IN THE

Supreme Court of the United States

VIRGINIA GSCHWIND, in her own right and Administratrix of the Estate of Cyril Gschwind and Alexandra Gschwind,

Petitioner,

v.

THE CESSNA AIRCRAFT COMPANY and PRATT & WHITNEY CANADA INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PRATT & WHITNEY CANADA INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the language of 28 U.S.C. § 1332(a)(2) so plainly prohibits the exercise of a federal court's diversity jurisdiction over a case brought by a foreign plaintiff against a domestic defendant and a foreign defendant that a contrary interpretation of the statute rendered by a district court constitutes a clear usurpation of its power?

2. When a party unsuccessfully exhausts all challenges to a district court's subject matter jurisdiction on direct appeal, does the doctrine of *res judicata* bar a subsequent collateral attack of the final judgment by that party on the same ground, even if the court erroneously exercised jurisdiction in the first instance?

STATEMENT PURSUANT TO RULE 29.6

The parent company for Respondent Pratt & Whitney Canada Inc., United Technologies Corporation, is the only publicly held company owning ten percent (10%) or more of Pratt & Whitney Canada Inc.'s stock.

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STATEMENT OF THE CASE

On August 16, 1993, Cyril Gschwind, a French citizen living in Belgium, died when the Cessna Caravan 208B aircraft he was piloting crashed near Cannes, France. His spouse filed a wrongful death action asserting products liability claims against The Cessna Aircraft Company ("Cessna"), a Kansas corporation that manufactured the aircraft, Pratt & Whitney Canada Inc. ("Pratt & Whitney"), a Canadian corporation that manufactured the engine used in the aircraft, and Hartzell Propeller Inc. ("Hartzell"), an Ohio corporation that manufactured some (but not all) of the propellers used on Cessna aircraft.

The defendants removed the case to the United States District Court for the Southern District of Ohio based on the argument that Hartzell, a resident of the forum State, was fraudulently joined to destroy diversity. Plaintiff's motion to remand to state court was ultimately denied after Hartzell was dismissed as a party.

Defendant Cessna then filed a motion to dismiss on the grounds of *forum non conveniens* or, in the alternative, sought a change of venue to the United States District Court for the District of Kansas. Pratt & Whitney followed with a motion to dismiss for lack of personal jurisdiction or, in the alternative, for dismissal based on *forum non conveniens*.

The Southern District of Ohio granted the alternative request of transfer to the United States District Court for the District of Kansas. Following transfer, the District of Kansas reviewed defendants' motions to dismiss based on *forum non conveniens* and ultimately dismissed the case on May 8, 1997.

Plaintiff appealed the district court's *forum non conveniens* dismissal to the United States Court of Appeals for the Tenth Circuit. On September 18, 1998, the Tenth Circuit affirmed the district court's dismissal on *forum non conveniens* grounds. *See Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602 (10th Cir. 1998).

Plaintiff then filed a petition for rehearing in the Tenth Circuit, in which she argued for the first time that the district court lacked subject matter jurisdiction over the case and requested that the Tenth Circuit's opinion affirming the district court's judgment be side aside for want of subject matter jurisdiction. On November 10, 1998, the Tenth Circuit issued, without opinion, an order denying plaintiff's petition for rehearing.

Upon the Tenth Circuit's denial of her petition for rehearing, plaintiff then filed a petition for a writ of certiorari with this Court. In her petition before this Court, plaintiff contended the United States District Court for the District of Kansas lacked subject matter jurisdiction under 28 U.S.C. § 1332. On May 17, 1999, this Court denied plaintiff's petition. *See Gschwind v. Cessna Aircraft Co.*, 526 U.S. 1112, 119 S. Ct. 1755, 143 L. Ed. 2d 787 (1999).

After this Court denied certiorari, plaintiff filed with the district court a motion to vacate judgment pursuant to FED. R. CIV. P. 60(b)(4), which provides, in pertinent part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void [.].

In the motion, plaintiff contended the district court's lack of subject matter jurisdiction over the action essentially rendered it powerless to dismiss it. Accordingly, argued plaintiff, the district court's judgment was void and should be vacated.

On October 4, 1999, the district court denied plaintiff's motion to vacate judgment pursuant to FED. R. CIV. P. 60(b)(4). (Pet., App. at 10a-19a). *See also Gschwind v. Cessna Aircraft Co.*, 189 F.R.D. 643 (D. Kan. 1999). In so holding, the district court found that a judgment is rendered void (and subject to collateral attack) only when the court has clearly usurped its power. (Pet., App. at 15a). The district court further held that even if it lacked subject matter jurisdiction, its exercise of jurisdiction in the case was based on an erroneous interpretation of 28 U.S.C. § 1332 and did not constitute a clear usurpation of constitutionally granted authority. (Pet., App. at 15a). Therefore, "once the United States Supreme Court denied plaintiff's writ of certiorari, the issue of subject matter jurisdiction became res judicata and cannot be collaterally attacked." (Pet., App. at 12a).

Plaintiff once again appealed the district court's order to the Tenth Circuit, which affirmed the district court's holding. (Pet., App. at 1a-9a). *See also Gschwind v. Cessna Aircraft Co.*, 232 F.3d 1342 (10th Cir. 2000). The Tenth Circuit held that the district court's judgment was not void for lack of subject matter jurisdiction. (Pet., App. at 6a). The Tenth Circuit found that even though the district court may have erroneously interpreted 28 U.S.C. § 1332, its interpretation of the jurisdictional statute did not constitute a clear usurpation of power voiding its judgment "because the scope of the district court's jurisdiction over a case with foreign parties on both sides of an action is far from clear

from the face of the statute." (Pet., App. at 5a-6a). In light of its holding, the Tenth Circuit deemed it unnecessary to address the issue of whether the doctrine of *res judicata* barred plaintiff's challenge of subject matter jurisdiction. (Pet., App. at 9a).

REASONS FOR DENYING THE WRIT

In her petition for a writ of certiorari, Ms. Gschwind ("Petitioner") seeks this Court's review of the Tenth Circuit's holding that affirmed the district court's denial of Petitioner's motion to vacate judgment pursuant to FED. R. CIV. P. 60(b)(4).

Petitioner presents two questions for this Court's consideration. The first question — Does 28 U.S.C. § 1332(a)(2) require a citizen of the United States on both sides of an action between foreign citizens? — did not control the decision of either the district court or the Tenth Circuit, and it certainly need not be addressed by this Court. Instead, the question germane to this proceeding, and which dovetails into Petitioner's second question for review, is whether the district court's interpretation of 28 U.S.C. § 1332(a)(2) and subsequent dismissal of the action on *forum non conveniens* grounds was tantamount to a "clear usurpation of power" necessary to void its judgment pursuant to FED. R. CIV. P. 60(b)(4). As explained below, the lower courts' analysis and application of 28 U.S.C. § 1332(a)(2), while arguably erroneous, did not amount to a clear usurpation of their authority.

Petitioner has already challenged the subject matter jurisdiction of the district court and Tenth Circuit in the direct appeal of the district court's dismissal of her suit on *forum*

non conveniens grounds. In fact, this Court denied the petition for a writ of certiorari filed by Petitioner in February 1999 that challenged subject matter jurisdiction. *See Gschwind v. Cessna Aircraft Co.*, 526 U.S. 1112, 119 S. Ct. 1755, 143 L. Ed. 2d 787 (1999). Therefore, this subsequent, collateral attack on subject matter jurisdiction brought by Petitioner is barred by the doctrine of *res judicata*.

For these reasons, which are expounded upon below, it is unnecessary for this Court to review the well-reasoned decisions of the Tenth Circuit Court of Appeals and the United States District Court for the District of Kansas.

I.

EVEN ASSUMING THE DISTRICT COURT AND TENTH CIRCUIT LACKED SUBJECT MATTER JURISDICTION OVER PETITIONER'S CAUSE OF ACTION, THE COURTS' EXERCISE OF JURISDICTION PURSUANT TO 28 U.S.C. § 1332(a)(2) DID NOT AMOUNT TO A CLEAR USURPATION OF AUTHORITY.

In the underlying cause of action, Petitioner, a Belgian citizen, filed suit against a United States corporation and a Canadian corporation. Therefore, the suit presented the following party alignment: "Alien vs. Citizen and Alien."

The federal statute governing diversity jurisdiction, 28 U.S.C. § 1332, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
>
> For purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

It is Petitioner's contention that the district court and Tenth Circuit lacked subject matter jurisdiction over the suit because the diversity statute does not contemplate the alignment of parties presented in this case. Petitioner argues that the district court's order dismissing the case on *forum non conveniens* grounds should be vacated because, pursuant to FED. R. CIV. P. 60(b)(4), the district court's judgment was void due to a lack of subject matter jurisdiction.

However, a judgment is void for lack of subject matter jurisdiction and open to collateral attack under FED. R. CIV. P. 60(b)(4) only when there is "a clear usurpation of power by a district court, and not an error of law in

determining whether it has jurisdiction." *Nemaizer v. Baker*, 793 F.2d 58, 65 (2d Cir. 1986); *see also Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980). In order to rise to the level of a "clear usurpation of power" necessary to void a judgment, "a court wrongfully extends its jurisdiction beyond the scope of its authority," *Kansas City Southern Ry. Co.*, 624 F.2d at 825, and there must be "no arguable basis on which [the court] could have rested a finding that it had jurisdiction." *Nemaizer*, 793 F.2d at 65.

The arguable basis for jurisdiction here rests in 28 U.S.C. § 1332(a)(2) (civil actions between "citizens of a State and citizens or subjects of a foreign state"). While Petitioner argues, and circuits squarely addressing the issue tend to agree, that 28 U.S.C. § 1332(a)(2) requires United States citizens on both sides of an action between foreign citizens, such an interpretation is not at all apparent from the face of the statute. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 428 (7th Cir. 1993) (Posner, J.) ("Exactly what sense all this makes rather eludes us."). A leading treatise on issues of federal procedure also recognizes the ambiguity in the diversity statute:

> A further question arises in cases in which there are aliens on both sides of the dispute but a citizen (or citizens) on only one. Section 1332(a)(2) makes the combination of "Citizen vs. Alien" acceptable and Section 1332(a)(3) ostensibly confers jurisdiction to "Citizen and Alien vs. Citizen and Alien." **Yet "Citizen and Alien vs. Alien" remains unaddressed by the statute**, other than by analogy to the case law that has disallowed jurisdiction when there are aliens

> on both sides of the dispute, the continued vitality of which is questionable under a literal reading of Section 1332(a)(3).

14A Wright & Miller, *Federal Practice & Procedure* § 3661 (1998) (emphasis added).

In a case such as this, where one side of the litigation is comprised only of a foreign party and the other has a combination of foreign and domestic parties, it "[does] not fit any of the possibly applicable jurisdictional pigeonholes." *Allendale Mut. Ins. Co.*, 10 F.3d at 428. Therefore, it requires a court to delve into the history and meaning of the statute in order to interpret it. Even if that court's statutory interpretation is deemed erroneous upon collateral attack of the court's judgment, an erroneous exercise of subject matter jurisdiction does not constitute a clear usurpation of power warranting the voiding of that judgment. *See Kansas City Southern Ry. Co.*, 624 F.2d at 825.

"Since federal courts have 'jurisdiction to determine jurisdiction,' that is, 'power to interpret the language of the jurisdictional instrument and its application to an issue before the court,' error in interpreting a statutory grant of jurisdiction is not equivalent to acting with total want of jurisdiction." *Kansas City Southern Ry. Co.*, 624 F.2d at 825 (quoting *Stoll v. Gottlieb*, 305 U.S. 165, 171, 59 S. Ct. 134, 137, 83 L. Ed. 104 (1938)). Here, because the scope of the court's jurisdiction posed by the "Alien vs. Citizen and Alien" scenario is far from clear from the face of the statute, there is an arguable basis for jurisdiction. *Nemaizer*, 793 F.2d at 65. Therefore, the courts' exercise of jurisdiction did not constitute a "clear usurpation of power," which is necessary to void the district court's judgment on collateral attack under FED. R. CIV. P. 60(b)(4).

II.

WHEN A PARTY UNSUCCESSFULLY CHALLENGES A DISTRICT COURT'S SUBJECT MATTER JURISDICTION ON DIRECT APPEAL, THE DOCTRINE OF *RES JUDICATA* BARS THE PARTY'S SUBSEQUENT, COLLATERAL ATTACK OF THE DISTRICT COURT'S FINAL JUDGMENT, EVEN IF THAT JUDGMENT IS BASED ON AN ERRONEOUS EXERCISE OF JURISDICTION.

Petitioner's wrongful death action was dismissed by the district court on *forum non conveniens* grounds on May 8, 1997. The Tenth Circuit affirmed the district court's order on September 18, 1998. Petitioner then filed a petition for rehearing with the Tenth Circuit, at which time Petitioner argued for the first time that the district court lacked subject matter jurisdiction. The Tenth Circuit denied Petitioner's petition for rehearing without comment. Petitioner then presented the jurisdictional argument to this Court in her petition for a writ of certiorari, which was denied on May 17, 1999.

The district court's May 8, 1997 judgment dismissing Petitioner's cause of action was a final, appealable judgment. *See Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U.S. 947, 70 S. Ct. 484, 94 L. Ed. 584 (1950) (holding that the dismissal of a claim on *forum non conveniens* grounds "puts an end to the action and hence is final and appealable"). Petitioner exhausted her direct appeals of the district court's final judgment when this Court denied her petition for a writ of certiorari on May 17, 1999. *Amcast Industrial Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir. 1995) ("[t]he denial of

certiorari . . . marks the end of the appellate process and so, if the judgment from which certiorari was sought were itself a final judgment . . . it establishes finality in a strong sense."). Using FED. R. CIV. P. 60(b)(4), Petitioner now seeks to collaterally attack the final judgment dismissing her claims on *forum non conveniens* grounds. This collateral attack on the prior judgment is barred by the doctrine of *res judicata*.

"[A] federal court's erroneous exercise of subject matter jurisdiction is not subject to collateral attack." *Nemaizer*, 793 F.2d at 65 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940)). "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage Dist.*, 308 U.S. at 377, 60 S. Ct. at 320. "Even if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties *could* have challenged the court's power to hear a case, then *res judicata* principles serve to bar them from later challenging it collaterally." *Nemaizer*, 793 F.2d at 65 (citing *Chicot County Drainage Dist.*, 308 U.S. at 378, 60 S. Ct. at 320)).

These principles have been reaffirmed by this Court on several occasions. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9, 102 S. Ct. 2099, 2104 n.9, 72 L. Ed. 2d 492 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations — both subject matter and

personal."); *see also Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2427, 69 L. Ed. 2d 103 (1981).

In an attempt to distinguish these well-reasoned decisions, Petitioner may identify case law suggesting that a court's subject matter jurisdiction can be collaterally attacked pursuant to FED. R. CIV. P. 60(b)(4). However, these cases "always involve a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction." *Nemaizer*, 793 F.2d at 65 (citing *Kansas City Southern Ry. Co.*, 624 F.2d at 825). " 'A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action].' " *Federated Dept. Stores, Inc.*, 452 U.S. at 398, 101 S. Ct. at 2428 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S. Ct. 600, 604, 71 L. Ed. 1069 (1927)).

Because the lower courts' exercise of jurisdiction did not rise to the level of a "clear usurpation of power," as explained in Section I *supra*, the doctrine of *res judicata* bars Petitioner's collateral attack on subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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